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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964.

JOHN P. LOMENZO, Secretary of State of the State of New York, and LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Defendants-Appellants,

v.

WMCA, INC., R. PETER STRAUS, JOSEPH DeMAIO, EDWARD LIND, S. THOMAS DELANEY, EDWARD C. BROWN, JAMES J. McCAFFERTY,

Plaintiffs-Appellees,

and

PAUL R. SCREVANE, President of the City Council of the City of New York, JAMES POWER, MAURICE J. O'ROURKE, JOHN R. CREWS and THOMAS MALLEE, Commissioners of the Board of Elections of the City of New York, EUGENE H. NICKERSON, County Executive, Nassau County, FRANCIS X. O'ROURKE, Chairman, Board of Supervisors, Westchester County, WILLIAM J. LEONARD, Chairman, Board of Supervisors, Suffolk County,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANTS' BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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No. 1099

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of the State of New York, *et al.*,
Defendants-Appellants,

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Appellees' motion asks the Court to dismiss or affirm on two grounds: (1) that the decision of the District Court in this case, declaring invalid Plans B, C and D of the New York Reapportionment Compliance Act as amended, presents no substantial Federal question; and (2) that Plans B, C and D were invalidated by the New York Court of Appeals in *Matter of Orans*, 15 N.Y.2d 339 (April 14, 1965), on independent State grounds.

In support of the first of these grounds, appellees do little more than refer to the decision of the District Court. They make no attempt to refute the arguments that were presented in our Jurisdictional Statement. We rely on the demonstration there made that the questions raised by this appeal are of unusual public importance and that the court below was wrong in declaring unconstitutional the use of fractional voting, and the use of a voter population base, in Plans B, C and D. The appeal clearly presents substantial and important Federal questions which justify full consideration by the Court. Appellees' motion makes no showing to the contrary.

The second basis for the motion to dismiss or affirm, namely that "independent state grounds" render Plans B, C and D invalid, is likewise without merit. Appellees' argument in this respect is based entirely on the assertion that the New York Court of Appeals in *Matter of Orans* invalidated these Plans on independent State grounds.

The motion misconceives the basis of the *Orans* decision. That case held that the reapportionment Plans violated a State constitutional provision fixing the size of the New York Assembly at 150 members. NEW YORK STATE CONSTITUTION, Art. III, § 2. But to reach that result the State court held that the 150-member limitation in the State Constitution did not violate the Equal Protection Clause of the Fourteenth Amendment, and was not invalidated by this Court as a part of the prior apportionment scheme struck down in *WMCA, Inc* v. *Lomenzo*, 377 U. S. 633 (1964). It was only after determining those Federal questions that the State court could rule that the 150-member limitation has continuing validity, so as to have application to the reapportionment Plans.

The effect of the State court decision is to restrict the Legislature in the difficult task of reapportionment, in a manner that is both detrimental to the proper exercise of

legislative discretion and, we believe, directly contrary to the intention of this Court when it directed the reapportionment of the New York State Legislature. A Notice of Appeal to this Court from the State court decision was filed on May 5, 1965, and a Jurisdictional Statement is being prepared for filing with this Court.

It is abundantly clear from the State court's opinion that its decision rested upon a determination of Federal questions. The court considered the precise question before it to be:

> "are any of the provisions of article III of our State Constitution, in addition to those directly passed on by the Federal courts in the *WMCA* case, in 'unavoidable conflict with the Fourteenth Amendment' (equal protection clause) of the Federal Constitution." (15 N.Y.2d at 349)

In holding the 150-member limitation operative so as to invalidate the reapportionment Plans, the State court emphasized, as the basis for its decision, that:

> ". . . neither the Supreme Court nor the District Court ever said or suggested that the 150-member Assembly limitation was unconstitutional or even involved in the Federal constitutional problems solved in the *WMCA* case, . . . absent such a holding of Federal unconstitutionality, the limitation remains intact." (*id.* at 346)

The appellants in *Matter of Orans* argued to the State court that the 150-member limitation of the State Constitution was an integral part of the prior scheme of apportionment which was invalidated by this Court in *WMCA*, and that the 150-member limitation could not, consistent with the Equal Protection Clause, co-exist

with the State constitutional provision for separate county representation in the Assembly. The State court, however, rejected these Federal claims. It held that "the unconstitutionality found by the United States Supreme Court relates almost entirely . . . to the provision . . . that each county no matter how small shall have an Assembly member." (*id.* at 351). It held that the 150-member limitation did not violate the Equal Protection Clause, was not affected by this Court's decision in *WMCA,* and continued to be operative.*

This Court has made it clear that where—as here—a State court decision determines the effect of the United States Constitution, or construes a decision of this Court on Federal questions, the State decision does not rest upon an independent state ground. *E.g. Standard Oil Co. of California* v. *Johnson,* 316 U. S. 481 (1942); *State Tax Commission* v. *Van Cott,* 306 U. S. 511 (1939).

As will be demonstrated on the appeal from the judgment of the State court in *Orans,* not only did that court necessarily rule on Federal questions, but it ruled incorrectly. This Court made it clear in *WMCA* that the 150-member limitation was an integral portion of the prior state apportionment scheme which was there struck down. In reaching its decision, this Court's opinion expressly con-

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*Mr. Justice Van Voorhis dissented, stating in part:

"Executing the mandate of the United States Supreme Court in *WMCA* v. *Lomenzo,* (377 U. S. 633), the three-Judge District Court decreed July 27, 1964: 'The scheme of legislative apportionment of the State of New York is hereby declared to be unconstitutional and void as being in conflict with the XIV Amendment of the Constitution of the United States.'

"It seems to me to be too clear for argument that an 'Assembly' consisting of 150 members was an inseparable part of the 'scheme of legislative apportionment' which was thus struck down." (*id.* at 355, 356)

demns the 150-member limitation as part of the invalid prior apportionment scheme, stating:

> *"With the size of the Assembly fixed at 150,* with a substantial number of Assembly seats distributed to sparsely populated counties without regard to population, and with an additional seat given to counties having 1½ population ratios, the population-variance ratios between the more populous and the less populous counties will continually increase so long as population growth proceeds at a disparate rate in various areas of the State. . . . [W]hen the effect of *these provisions,* and the statutes implementing them, on the right to vote of those individuals living in the disfavored areas of the State is considered, we conclude that neither the existing scheme nor the forthcoming one [under the 1960 census] can be constitutionally condoned." (377 U. S. at 654) (Emphasis supplied.)

The court in *Orans* stated that it did not construe the foregoing "passing reference" by this Court as a holding that the 150-member limitation fell as a part of the prior New York apportionment scheme. The State court concluded that this Court never "said or suggested that the 150-member Assembly limitation was unconstitutional or even involved in the Federal constitutional problems solved in the *WMCA* case. . . ." (15 N.Y.2d at 346)*

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*The New York Court of Appeals likewise misconstrued the decision of the District Court in this case; it attributed to the District Court a holding that the *WMCA* decision did not impair the validity of the 150-member provision. *In fact, appellees conceded in the District Court that the 150-member provision had been invalidated by the Supreme Court,* and the District Court therefore did not pass on the question of the continuing validity of that provision when it ruled that the State constitutional provisions *relied on below by appellees* continued to be operative. (See Jurisdictional Statement, page A-9.)

As seems clear from this Court's opinion in *WMCA*, the Court held that under an apportionment scheme that fixed the size of the Assembly at 150 members, the disparity between urban and rural representation caused by the provision for separate county representation would increase so long as the population growth proceeded at different rates in different areas of the State. It was the express holding of this Court that the 150-member limitation and the provision for separate county representation could not constitutionally co-exist under the Equal Protection Clause. This Court did not, as the State court concluded, strike down the provision for separate county representation and leave standing the restriction on the size of the Assembly. Rather this Court held that the two provisions in combination violated the Equal Protection Clause.

Finally, appellees' motion mistakenly asserts that this appeal can have no practical effect on New York apportionment. On the contrary, the decision of this Court as to Plans B, C and D will directly control the apportionment to be used in New York in 1966* and subsequent elections.

In sum, the decision of the New York Court of Appeals in *Matter of Orans* clearly determined Federal questions. It did not rest on independent State grounds. That decision in no way diminishes the substantiality of the Federal questions presented on this appeal. The determination of these questions by this Court remains of the utmost importance to the orderly reapportionment of the New York State Legislature.

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*On May 24, 1965 the District Court directed that the 1965 State election take place pursuant to Plan A of the Reapportionment Compliance Act. This Court, on June 2, 1965, denied a motion to stay the order of the District Court as well as a motion to accelerate an appeal from the order.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted,

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June, 1965.

END